IN THE
SUPREME COURT OF THE UNITED STATES

No. 76-1323

CAROL KINGDON FOSTER,

Petitioner,

VS.

GEORGIA PHILLIPS KINGDON,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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STATEMENT OF THE CASE

In 1961, the Respondent, Mrs. Betty Kingdon,and Mr. Harry Ragan Eidson obtained a divorce in the Inferior Court of Equity in Geneva County, Alabama. Both parties consented to the jurisdiction of the Alabama Court but, in his answer, Mr. Eidson denied all allegations of the Complaint, including those related to domicile. The Alabama Court determined that the Respondent was domiciled in the State of Alabama and issued the divorce decree.

A few years later, the Respondent married Fred William Kingdon, Jr. The couple remained married until the death of Mr. Kingdon eight years later. In connection with probate proceedings following Mr. Kingdon's death, his

daughter sought to attack the validity of the latter marriage on the ground that Mrs. Kingdon had not been validly divorced from Mr. Eidson thirteen years previously. Mr. Kingdon's daughter contended that Mrs. Kingdon was never a resident of the State of Alabama.

The Trial Court permitted Appellant to collaterally attack the divorce decree of the State of Alabama. The Georgia Supreme Court reversed the decision of the Trial Court. The Georgia Supreme Court held that it was bound by the mandate of the full faith and credit clause of the Constitution of the United States to disallow a collateral attack by a stranger to a divorce decree in a Georgia court since the Alabama court would not permit a collateral attack. The Georgia Supreme Court held:

> "The 1961 Alabama judgment must be accorded full faith and credit; and Mrs. Foster is prevented from attacking it on the ground that the Alabama Court that rendered it lacked subject matter jurisdiction." (A-4)

SUMMARY OF ARGUMENT

The Petition for Certiorari should not be granted. The Georgia Supreme Court in upholding the validity of the judgment of its sister state properly and conscientiously followed the de-

cisions of the United States Supreme Court.

ARGUMENT

SECTION I

When both parties to a marriage participate in a divorce decree and have a full and fair opportunity to contest all issues including the question of whether the Court has jurisdiction to render the decree, the decree may not be later attacked in a second state by a stranger to the divorce unless it could be so attacked in the state rendering the decree.

In Johnson v. Muelberger, 340 U.S. 581, 95 L Ed 552 (1950), a couple residing and married in New York State appeared in a Florida court and were granted a divorce under Florida law. The husband remarried. After his death, his new wife sought a statutory one-third share of his estate under the laws of the State of New York. The daughter of the deceased husband contended that the second wife had no right to take the statutory one-third share since she could not legally have married the deceased. The daughter argued that her father had never been properly divorced in Florida since neither her father nor his first wife ever became residents of the State of Florida. In reversing the decision of the New York Court of Appeals, the

Supreme Court of the United States held that the divorce could not have been collaterally attacked in Florida and, consequently, could not be collaterally attacked in a second state. The Supreme Court of the United States stated at 586:

> ". . . the requirements of full faith and credit barring a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister state where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the state which rendered the decree." (Emphasis Added.)

The Court stated at 584:

"From judicial experience with and interpretation of the clause, there has emerged the succinct conclusion that the Framers intended it to help weld the independent states into a nation by giving judgments within the jurisdiction of the rendering state the same faith and credit in sister states as they have in the state of the original forum. The faith and credit given is not to be niggardly, but generous, full.

Local policy must at times be required to give way, such is part of the price of our federal system."

The Court stated at 585:

"One trial of an issue is enough. The principles of res judicata apply to questions of jurisdiction as well as to other issues as well to jurisdiction of the subject matter of the parties."

The Court stated at 586:

> ". . . a state by virtue of the clause must give full faith and credit to an out-of-state divorce by barring either party to that divorce who has been personally served or who has entered a personal appearance from collaterally attacking the decree. Such an attack is barred where the party attacking would not be permitted to make a collateral attack in the courts of the granting state."

The Court held that Florida would not permit a collateral attack on the divorce decree by a stranger to the divorce. The Court stated at 588:

> ". . . late opinions of Florida indicate that the child would not be permitted to attack the divorce, since the child had a mere expectancy at the time of the divorce . . . . It is

only those strangers who, if the judgment were given full credit and effect, would be prejudiced in regard to some pre-existing right, that are permitted to impeach the judgment. Being neither parties to the action, nor entitled to manage the cause, nor appeal from the judgment, they are by law allowed to impeach it whenever it is attempted to be enforced against them so as to affect rights or interest acquired prior to its rendition."

The Georgia Supreme Court found that the Alabama Court would not permit a collateral attack on the divorce decree presented here. Therefore, under the rulings of the United States Supreme Court, Mrs. Foster was not permitted to collaterally attack the decree in Georgia.

In Sherrer v. Sherrer, 334 U.S. 343, 92 L Ed 1429 (1948), both parties to a New York marriage participated in a Florida divorce. At the hearing in Florida, the husband argued that the Florida Court did not have jurisdiction to render the divorce decree since his wife was not a resident of Florida. Later, the first husband sought to attack the decree of the Florida Court in New York.

The Supreme Court of the United States at first distinguished this case from those cases in which both parties to

the divorce do not have an opportunity to litigate the issue of jurisdiction. The Supreme Court of the United States showed that ex parte divorces are not subject to the same protection as divorces in which both parties participated, stating at 347:

"At the outset, it should be observed that the proceedings in the Florida Court prior to the entry of the decree of divorce were in no way inconsistent with the requirements of procedural due process."

The Court went on to explain the rationale for the doctrine of res judicata, stating at 350:

"Insofar as cases originating in the Federal Courts are concerned, the rule has evolved that the doctrine of res judicata applies to adjudications relating either to jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate .... It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in Court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decisions as to jurisdiction there rendered merely retries the issue previously

determined. . . ."

"This Court has held that the doctrine of res judicata must be applied to questions of jurisdiction in cases arising in State Court involving the application of the Full Faith and Credit Clause where, under the law of the State in which the original judgment was rendered, such adjudication is not susceptible to collateral attack."

In applying the doctrine of res judicata to the divorce situation, the Court stated at 351:

". . . the requirements of Full Faith and Credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister state where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree."

The Supreme Court of Georgia correctly applied the principles set forth in Johnson v. Muelberger, supra, and Sherrer v. Sherrer, supra, Williams v. North Carolina, 325 U.S. 226, 65 S. Ct. 1092, 89 L Ed 1577 (1945), relied on in Petitioner's Brief, involves an ex parte divorce and thus is controlled by due process considerations not

present here. Durfee v. Duke, 375 U.S. 106, 84 S. Ct. 242, 11 L Ed 2d 186 (1963), also relied on in Petitioner's Brief, merely holds that the Full Faith and Credit Clause applies when parties have fully and fairly litigated a particular issue. Throughout the cases, the Supreme Court has interchangeably utilized the phrases "participation by the defendant" and "full opportunities to contest the jurisdictional issues", see Johnson v. Muelberger, 340 U.S. at 586 and Sherrer v. Sherrer, 334 U.S. at 351 and the terms "fully and fairly litigated", see Durfee v. Duke, 375 U.S. at 111. There is no distinction made between a situation in which the parties resolve an issue by stipulation or consent and when the parties resolve an issue by litigation. Here, the fact that Mr. Eidson did not vigorously contest the domicile issue does not change the fact that res judicata applies. See, e.g., Alikonis v. Alikonis, 36 Ill. App. 3d 159, 343 N.E. 2d 161 (1976) at 163.

SECTION II

The Alabama courts do not permit a stranger to a divorce decree to collaterally attack a divorce decree when the decree is valid on its face and both parties to the marriage participated in the divorce.

In Aiello v. Aiello, 133 So. 2d 18

(Ala. 1961), the husband sought to nullify his wife's earlier divorce on the grounds that at the time neither his wife nor her former husband had been residents of the State of Alabama. The husband complainant sought to annul his marriage.

The Court held that because the complaining husband had learned of possible defects in his wife's divorce more than one year prior to bringing the action, he was barred from bringing it by the defense of laches. The Court went on to say at 22:

> "The foregoing conclusion as to delay is reached under the assumption that complainant, as ostensible second husband of a party to the divorce suit, possesses standing to bring an original bill in the nature of a bill of review for the purpose of vacating such divorce decree. That is merely an assumption. He was not a party to the divorce suit.We do not think he possessed, at the time the divorce decree was rendered, any right which was adversely affected by the decree . . . ."

On the basis of the Alabama Supreme Court's decision in Aiello, the Maryland Court of Appeals in the case of Leatherbury v. Leatherbury, 196 A.2d 883 (Md. 1964) determined that if squarely presented the issue, the Ala-

bama Supreme Court would not permit a collateral attack on a divorce decree rendered when both parties were legally present. The Court stated at 886:

> ". . . there is a clear indication in Aiello v. Aiello, supra, at page 22, of 133 So. 2d, that Alabama would hold that the subsequent spouse had no standing (for lack of legal interest at the time) to attack the divorce of his present spouse."

The Maryland Court thus denied the collateral attack.

Yerger v. Cox, 498 So. 2d 282 (Ala. 1967) involved the situation presented here. The defendant there had been divorced in a proceeding in an Alabama Court. Later she had married the deceased. The children of the deceased sought to collaterally attack the divorce of the defendant for purposes of deciding inheritance rights. The Alabama Supreme Court held that the children could not be permitted to attack the prior divorce. The Court quoted from the Florida Supreme Court decision of Demarigny v. Demarigny, 43 So. 2d 442 (Fla. 1949) (the same case relied upon by the United States Supreme Court in Johnson v. Muelberger, supra) in stating at 282:

"It is only those strangers who, if the judgment were given full credit and effect, would be prejudiced in regard to some pre-existing right that are permitted to impeach the judgment."

The Court went on to say that any interest they sought to assert must be acquired prior to the rendering of the divorce. The Alabama Supreme Court noted that this is the prevailing view and cited cases appearing in 12 A.L.R. 2d 727, See, also, 28 A.L.R. 2d 1328, and the latter cases service to both A.L.R. annotations.

In Weisner v. Weisner, 213 So. 2d 685 (Ala. 1968), the complainant had married a woman who had previously been divorced in Alabama. The defendant woman had later married the complainant in this action. She filed a suit against the complainant for separate maintenance in the New York State Courts. The complainant sought to collaterally attack the Alabama divorce. The New York Court of Appeals held that Alabama, not New York, was the proper place where the Alabama divorce should be attacked. Consequently, the complainant filed this action in Alabama.

The Supreme Court of Alabama held that the complainant was not permitted to collaterally attack his wife's prior Alabama divorce. The Court rested its decision on Yerger v. Cox, supra, and stating, in quoting Yerger v. Cox, the following at 686:

"We hold that a collateral attack against a decree of divorce rendered in Alabama cannot be maintained in the courts where the attack is instituted against non-resident strangers to the original divorce proceedings when the decree is not void on the fact of the decision."

In effect, the Supreme Court of Alabama precluded all avenues of collateral attack on its divorce decrees in situations similar to the instant one.

The Supreme Court of Georgia cited Alikonis v. Alikonis, 343 N.E. 2d 161 (Ill. App. 1976) with approval in its opinion below. In Alikonis, a man sought to collaterally attack the prior Alabama divorce of his purported wife. The Illinois Court held that Alabama would not permit a collateral attack relying on Yerger v. Cox, supra, and Weisner v. Weisner, supra.

CONCLUSION

Page 16 of the Rules of the Supreme Court of the United States state:

"Considerations governing review on Certiorari is not a matter of right but of sound judicial discretion and will be granted only where there

are special important reasons therefor. The following, while neither controlling nor measuring the Court's discretion, indicate the character of reasons which will be considered (a) where a State Court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions by this Court . . . ."

Here, the Supreme of Georgia has properly and conscientiously rendered a decision in accord with the decisions of the United States Supreme Court. The issue presented here has already been decided by the United States Supreme Court. The Writ Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA upon Petitioner by mailing same by United States Mails, postage prepaid, to the following counsel:

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This the 8th day of April, 1977.

O. Jackson Cook